

Testimony in support of SB 324

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I have been involved in SLR issues since 2010 when Missoula County declared that a structure on our property was an "unauthorized subdivision" and had to undergo review as a "subdivision for lease or rent". I was the person who asked Rep. Champ Edmonds to carry HB 494 last session; this bill as amended by Gov. Schweitzer passed the House but tied on the second vote in the Senate. I was the only representative of private landowners on the working group of stakeholders who met during the interim under HJR 39 (2011 legislature) and reported to the Joint Committee on Education and Local Government last fall on the consensus points for SLR reform legislation. SB 324 contains all of our consensus points and establishes a very sensible framework for the issues on which we couldn't reach consensus such as the number of structures to exempt. As explained below, I am also the co-owner of a business that is on the verge of closing (and we are on the verge of bankruptcy) because of subdivision for lease or rent as it currently exists.

"Subdivision for Lease or Rent" (SLR) is a looming disaster for the State of Montana. To prevent serious damage to Montana's economy, it is essential that SB 324 becomes law. Until January 2012, SLR was a problem inhibiting economic development only in 3 Montana Counties (Ravalli, Missoula, and Lewis & Clark). The Deputy County Attorneys in these counties have pushed hard to make the rent or use of any portion of a parcel subject to completion of subdivision review. This is not restricted to human dwellings as legal opinions from the Missoula Co. Deputy Co. Attorney makes clear:

"Under the plain meaning of these definitions, any alteration of a parcel of land which would enable transfer of possession of a portion of the parcel including through rental or lease, is legally a "division of land" and a "subdivision". [refers to 76-3-103 (4) and (16)]. (May 19, 2008 memo from Missoula County Deputy Attorney James McCubbin to OPG staff).¹

"It is also possible that a subdivision for lease or rent may exist without any structures at all—...." (December 5, 2008 memo from James McCubbin to OPG staff)¹

SLR therefore pertains to any structure including horse stalls² or dog kennels. Based on the second quote above, it is clear that review as a "subdivision" could legally apply to parcels where portions are rented as pasture lands, a garden plot, or even where parking spaces are rented. This is the EXISTING law following the AG's decision. Unless SB 324 is passed into law this extreme interpretation of what a "subdivision" is will be required to be enforced statewide and not just in the 3 counties who were interpreting the law in this radical way prior to the AG's opinion. Unless the law is changed, thousands of small and large businesses across the state in addition to thousands of landowners who have structures that are considered "subdivisions" under the current law can be forced to undergo review as subdivisions. This review costs a minimum of \$20,000 to have done professionally and is, frequently, impossible to achieve. When it can't be achieved, these existing businesses can be forced to close. Although it seems too incredible to believe, exactly this is happening to us at Dunrovin Ranch in Missoula County (see below).

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You will likely hear from the opponents of SB 324 that the bill limits the authority of local governmental units. This argument has it 100% backwards. Since the AG's decision, the requirement NOW EXISTS that all Montana counties must consider structures qualifying as for lease or rent as being subdivisions. The EXISTING LAW is what is a huge constraint on local governmental authority, not SB 324. Maintaining the status quo that now exists will force all of Montana to implement the Platting and Zoning Act in the extreme way previously insisted on by just 2 Deputy County Attorneys (one of whom created this havoc in both Ravalli and Missoula Counties).

Not just new proposed structures will be required to undergo review as "subdivisions" so will the thousands of existing businesses and private property owners throughout Montana who lease or rent portions of their property or buildings such as the guest cabins rented to tourists found in every Montana County. They don't even have to rent these structures in the view of the Missoula Deputy County Attorney, it is a "subdivision" if it "could be" leased or rented³. The 53 County that were formerly ignoring the extreme interpretation of SLR that these 2 Deputy County Attorneys now have have no option but to treat all buildings that are or could be used for lease or rent as "subdivisions" and to require that they be reviewed as subdivisions. This is the case regardless of how long these buildings have existed or how long they've been used for lease or rent.

Anyone in your county with a structure that is or could be used for lease or rent is vulnerable not only to this kind of action from County officials, any disgruntled neighbor can bring a lawsuit against anyone he thinks is vulnerable to SLR. Such neighbors will likely prevail unless the law is changed.

Four examples of how SLR has been used to cripple small businesses in Montana

In *Rose v. Ravalli County* (2005), the County told the John and Sandy Rose who owned the Skalkaho Valley Lodge that they had to undergo subdivision review to build 4 small guest cabins on their 200 acres that already included a guest lodge. The County prevailed and the guest cabins, and associated taxes and benefits to the state and county were never built. (James McCubbin was the County Attorney in Ravalli Co. at that time).

In *Derek v. Lewis and Clark County* (2011), Bill and Joyce Derek had an existing 1,300 square foot apartment above a detached garage that they want to rent to supplement their retirement income. They were told, among many other things, that in order to complete subdivision review for lease or rent they had to obtain 60' easements on all the roads leading to their property including state and county roads. They lost and their apartment still can't be rented.

The worse cases, however, have been in Missoula County where there is an exceptionally eager advocate for SLR in Deputy County Attorney James McCubbin. In 2012, the County told Cindy Archer that she had to undergo subdivision review to put a second coffee kiosk on her property within a zoned area in the City of Missoula (see attached Missoulain editorial). This was allowed under City zoning regulations but nevertheless subject to SLR.

In my own case, we have a small guest ranch (Dunrovin) that has a building built in 1985 (long before we bought the property) that has 2 units that we rent on a short term basis to guest ranch clients who pay

corresponding bed taxes. In 2010 when we applied for a permit to build a garage, the County decided that the 1985 building was an "unauthorized subdivision" and that we had to undergo subdivision review for it. We couldn't do subdivision review because they insisted we needed a 60' access easement on all of the roads leading to our property which was impossible to get from neighbors who owned property along these roads. Not only wouldn't the county give us the building permit for the garage, they refused to give us a permit to upgrade our septic system until we completed subdivision review. In 2012, Missoula County filed suit against us because they claimed our septic system was inadequate even though it was the County that was refusing to give us a permit to upgrade the septic system. This has cost us about \$50,000 in legal and other associated fees. This litigation is still pending and the County continues to maintain that we owe fines of \$2,500/day since last summer. We are in a box with no exit except for passage of SB 324. This is described in the attached Missoulian article which incorrectly has a headline that the county was trying to "temporarily" shut us down; it was and is trying to shut us down permanently. All this for a small Montana-owned guest ranch that has only upsides for Missoula County and the State of Montana.

Then -gubernatorial candidate Steve Bullock told me that he would sign "reasonable" SLR reform if elected governor and SB 324 is certainly reasonable. It has all of the consensus points recommended by the stakeholders reporting to the legislature under HJR 39 (2011 legislature) and was developed through extensive discussions between Sen. Rosendale and various state and county agencies and interest groups. Steve Bullock told me that he didn't want to issue his decision in January 2012 but was forced to by the Missoula County Attorney who demanded the opinion. I believe Gov. Bullock recognizes that SLR as it currently exists is bad public policy and needs to be reformed. Please pass SB 324 and don't let it get bogged down with amendments as happened in the last session with HB 629 which never made it through the legislature.

¹ These and other memos from James McCubbin can be seen under the tab "McCubbin memos" on the website: www.MontanaSubdivisionLaw.com that was created for the 2011 legislature.

² Email from James McCubbin to our attorney Colleen Dowdall dated 2/19/13 "...under current law renting of horse stalls constitutes a subdivision for lease or rent."

³ This was acknowledged in Missoula County when, in summer 2012, the county adopted a modification to their subdivision rules allowing property owners to escape SLR review if they signed a "use agreement" that promised that named structures would never be leased or rented; this is a permanent encumbrance on the property that restricts, as well, all future owners of parcels with such "use agreements".

Subdivision laws stifling small business in Missoula; 2013 Legislature must seek solutions

DECEMBER 23, 2012 7:00 AM • MISSOULIAN EDITORIAL

We can talk about economic development until we're blue in the face, but when a coffee cart owner has to pay more than \$6,600 in fees and spend months waiting to expand her small business, it's time to admit something important is missing from the conversation.

In this case, what's missing is a discussion about how best to mitigate the negative effects of a relatively new interpretation of certain state subdivision laws. And since incoming Gov. Steve Bullock is none other than the author of that interpretation, he's the perfect person to lead such a discussion – and propose some permanent fixes.

The coffee cart owner is Missoula's own Cindy Archer, who is struggling to open a second location under the staggering weight of the state's subdivision for lease or rent regulations. Archer owns the Caffè Gita coffee kiosk at the corner of North and Higgins avenues, and would like to open another coffee shop named Lefty's Place at 900 E. Broadway, on the Diamond Jim's Casino and Liquor Store property.

Lefty's Place was supposed to open in September but is now months behind schedule. Archer has also spent a whopping \$6,637 on fees – about half the cost of the coffee cart itself. ("That's a lot of money for a micro-business," Archer told a Missoulian reporter. Actually, that's a lot of money for any business).

The reason for the delay and the reasoning behind the fees is that the coffee cart could be considered an additional "leased structure" on a parcel that already contains a building – thus, it requires approval as a subdivision. And as any housing developer can attest, subdivision review is an arduous, and expensive, process.

For businesses like Archer's this process would be on top of the one that's already in place for business licensing. Unfortunately, while Lefty's Place is reportedly the first Missoula business to face the fallout from this overly inclusive new interpretation, unless the regulations are amended – and amended quickly – it won't be the last.

The regulations covering subdivision for lease or rent have been a point of contention in Missoula County for several years now. In an effort to clear up the controversy, Missoula County asked the Montana Attorney General's Office to take a close look at the oft-disputed statutes. In January, Attorney General Steve Bullock issued his interpretation – but this didn't end the controversy. Indeed, several months later Missoula County Commissioners, seeking to add some flexibility to the subdivision regulations, voted in favor of an amendment that allowed residents to make small changes to their properties without a full review – so long as they first sign a user agreement pledging not to lease or rent any new structures.

More recently, Missoula City Attorney Jim Nugent has been examining the regulations with an eye toward squeezing in an exemption for structures that don't stand on a permanent foundation. That's a good start, but it doesn't go far enough.

County resident Sterling Miller, who co-owns a guest ranch in Lolo, has a good idea of what's needed to get excessive subdivision regulations off the backs of small businesses once and for all. Miller has been actively involved in subdivision for lease or rent regulation arguments for some time now, and is working with an interim committee that will be introducing a set of legislative suggestions this session.

Miller was a supporter of a previous effort to make improvements to the Subdivision and Platting Act during the last legislative session as well. However, House Bill 494, which was sponsored by Missoula Republican Rep. Champ Edmunds, fell victim to Gov. Brian Schweitzer's veto after the governor's amendments to the bill were rejected by the House.

Archer isn't waiting on the Legislature, of course. She continues to jump through all the required hoops, although she really shouldn't have to. Nobody in her position should have to.

Partially in recognition of this, a Missoula City Council committee recently threw its support behind a motion to waive Archer's fees. Then, just last Monday, the full council ended up tabling that recommendation.

Clearly, City Council is in no position to provide the swift resolution that's needed to help this one business, let alone make headway toward long-term subdivision regulation changes. Instead, everyone seems to be looking to the 2013 Legislature for solutions. ("We're certainly looking for a legislative fix this session because I think the product here is not what anyone necessarily intended," Mayor John Engen told a Missoulian reporter.)

It's Bullock who should lead the legislature in proposing improvements. And he should make sure to meet with folks like Archer and Miller first.

As the person who came up with the current interpretation, no one is in a better position than Bullock to lead legislators through the intricacies of these rules to arrive at a solution that will require no further re-interpretation – or disproportionate burdens on small business owners.

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Missoula County wants Lolo ranch temporarily shut down for noncompliance

permanently
← error



11 HOURS AGO • BY KIM BRIGGEMAN OF THE MISSOULIAN

Owners of a popular Lolo guest ranch were in District Court at the Missoula County Courthouse on Wednesday, battling efforts by Missoula County to shut down their business until they comply with health and subdivision regulations.

Judge Ed McLean heard 90 minutes of testimony from attorneys and Sterling and SuzAnne Miller of Dunrovin Ranch before continuing the case until Friday at 8:30 a.m.

McLean scolded both sides during the hearing, saying at one point he would not let the complex case get sidetracked by attorney wars.

"When I see things tied up because of bureaucracies, then I go nuts and start saying, 'Well, we'll go without it,' "McLean said. "And bureaucrats aren't just on the county side. Bureaucrats can be on both sides, including if attorneys start playing word games."

The Millers have been active and outspoken advocates for reform of the state's subdivision law for lease and rent since they ran up against it in 2010. They say they're trying to do everything they can to make Dunrovin compliant, but that the county and deputy civil attorney James McCubbin in particular have used "draconian" measures in applying it to their business.

The county alleges numerous violations of state and county subdivision and sanitation regulations since SuzAnne Miller started the equestrian-oriented guest ranch in 2006. The Millers remodeled and expanded a former garage building to establish two apartments and started constructing a separate building before they were told they couldn't without going through expensive subdivision review.

Foremost among Missoula County's complaints is the absence of an updated certificate of subdivision approval, or COSA, from the state Department of Environmental Quality.

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The Millers have applied for a COSA rewrite, but the application is sitting at the Missoula City-County Health Department.

"Its status is it's on hold because the property is not in compliance with Subdivision for Lease or Rent, and that is the problem," McCubbin said. "We can't process anything because we haven't received an application" for subdivision.

Such an application is in the works. Dunrovin's attorney, former deputy county attorney Colleen Dowdall, said the Millers met a month ago with the Office of Planning and Grants to find out what they needed to do to file a subdivision application. They've since submitted an extensive pre-application that was well-received by OPG's Tim Worley, Dowdall added, and another meeting is set for Friday to set the process in motion.

In the meantime, she said, McCubbin filed a request for a preliminary injunction to shut down Dunrovin "because of the allegations of violations."

"My point is the Millers are doing everything within their power to comply and not being allowed to comply," Dowdall said. "You have to have a COSA approved, but you can't get it approved until subdivision for lease or rent is approved and you can't get that approved until you've done who knows what. We don't know because we haven't been told what will happen."

The Millers, whose enterprises at Dunrovin include a osprey nest webcam that has drawn attention from around the globe, said it would be easy to reach a resolution that satisfies everyone and keeps them in business without dragging a judge into the melee.

They say they're willing and county commissioners have the authority to allow them to upgrade their septic system, rewrite the COSA and complete construction without shutting them down. They'd like to do it before the summer season begins in April, and they would agree to complete the subdivision review process within three months of the close of the 2013 Montana Legislature, where half a dozen bills are expected to be introduced to "fix" the subdivision for lease or rent statute.

"Let me tell you where I'm at with legislation," McLean said. "I'm not going to sit here and hold off waiting for a legislature to enact or not to enact. We're going forward with the laws that we have on the books."